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No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1958

MAURICE A. WHEELER, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 31-38) is reported at 256 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1958 (Pet. 39-40) and a petition for rehearing was denied on August 8, 1958. The petition for a writ of certiorari was filed on September 5, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals had jurisdiction to review the Government's appeal from the District Court's pre-trial dismissal of an indictment on the ground that it was based upon evidence obtained in violation of petitioner's privilege against self-incrimination.

2. Whether the Court of Appeals, assuming it had jurisdiction, properly reversed the pre-trial order of dismissal and suppression entered by one district court judge because it was contrary to the earlier ruling of another district court judge having co-ordinate jurisdiction.

3. Whether, on the merits, it was error for the second district judge to order dismissal of the indictment and suppression of the evidence.

STATUTE AND RULE INVOLVED

18 U.S.C.:

> SEC. 3731 [as amended by Sec. 5, Act of May 24, 1949, c. 139, 63 Stat. 89]. *Appeal by United States*
>
> * * *
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * *

Federal Rules of Criminal Procedure:

Rule 12. *Pleadings and Motions before Trial; Defenses and Objections*

* * * * *

(b) *The Motion Raising Defenses and Objections:*

* * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * *

STATEMENT

On September 9, 1954, petitioner was indicted in the United States District Court for the Western District of Pennsylvania for willful attempted evasion of his 1950 individual income tax. (R. 1a, 9a.) On October 18, 1954, petitioner, having pled not guilty, moved to suppress certain evidence and to dismiss the indictment. (R. 2a.) The motion to dismiss alleged,

inter alia, that the indictment had been procured "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights." (Pet. 9, 23.) Judge John L. Miller granted a full hearing on the motion to suppress evidence, at which the testimony of several witnesses was taken. (R. 2a, 1b-31b.) Briefly, this testimony disclosed that, before the investigation began, petitioner, an attorney, was suspected of being connected with some misfeasance by employees of the Internal Revenue Service. An audit of petitioner's records was made which had the dual purpose of determining the correctness of petitioner's returns and also whether his records reflected any connection between petitioner and the suspected misfeasance. (R. 12a, 11b-17b.) The investigating agent called petitioner on the telephone and advised him that he had his 1950 income tax return for examination and would like to make an appointment to come to petitioner's office and examine his records. (R. 15b.) The agent did not advise petitioner that he was also interested in obtaining evidence with respect to any involvement with the suspected Internal Revenue employees. (R. 16b-17b.) An appointment was made for that afternoon, when petitioner turned his records over to the agent. (R. 15b, 26b.) The examination disclosed no criminal conduct on petitioner's part with respect to Internal Revenue personnel, but it did disclose the receipt of substantial legal fees which petitioner had not reported on his income tax return. (R. 20b-23b.)

On August 17, 1955, Judge Miller denied the motion to suppress evidence and the motion to dismiss

the indictment, without prejudice to petitioner's right to object at the trial to the admission of evidence obtained from his records. (R. 3a, 9a-14a.) In December, 1955, on petitioner's motion, Judge Miller heard reargument on the motions to suppress and to dismiss. On May 1, 1956, Judge Miller filed an opinion and order directing the dismissal of the petition for reargument and reconsideration. (R. 4a, 15a-16a.) Petitioner's appeal to the Court of Appeals for the Third Circuit was dismissed for lack of jurisdiction. (R. 4a.) Thereafter, petitioner filed a second petition for rehearing on his motion to suppress evidence before Judge Wallace S. Gourley, to whom the case had been assigned for trial. (R. 5a.) Judge Gourley, after hearing the testimony of several witnesses on the motion to suppress, granted petitioner's motion on March 20, 1957. (R. 5a-6a, 17a-26a.) The Government's motion for rehearing was denied on September 6, 1957, at which time Judge Gourley granted petitioner's previous motion to dismiss the indictment on the ground that it was based on evidence "procured under circumstances constituting self-incrimination * * *". (R. 7a, 28a-36a.) The Court of Appeals reversed Judge Gourley with respect to both the motion to suppress and the motion to dismiss and remanded the case for trial, holding that there were insufficient reasons to warrant Judge Gourley's granting of the motions on substantially the same evidence on which Judge Miller had twice denied them. (Pet. 31, 35.)

ARGUMENT

1. Petitioner's contention (Pet. 14-17) that the Court of Appeals lacked jurisdiction (*i. e.*, that Judge Gourley's order dismissing the indictment is not appealable under the Criminal Appeals Act, 18 U.S.C. Sec. 3731, *supra*) is based on the curious misstatement that the order "was not based on any objection brought against the indictment itself, and that the defendant had made no attack on the indictment" (Pet. 16). The record clearly shows that on October 18, 1954, petitioner moved to dismiss the indictment, alleging, *inter alia*, that it had been obtained "under circumstances constituting self-incrimination and in violation of defendant's constitutional rights". (*Supra*, pp. 3-4.) Judge Gourley dismissed the indictment on this ground (R. 34a-36a) and, as the Court of Appeals pointed out (Pet. 37-38), the dismissal was entered under Rule 12(b)(2) of the Federal Rules of Criminal Procedure (*supra*, p. 3). This case is, then, readily distinguishable from *United States* v. *Janitz*, 161 F. 2d 19 (C. A. 3d), and *United States* v. *Pack*, 247 F. 2d 168 (C. A. 3d), the cases relied upon by petitioner (Pet. 14, 17). In those cases the trial courts had ordered suppressed vital evidence without which the Government could not obtain convictions, and the indictments were dismissed for lack of prosecution. In the instant case the Government appealed from the pre-trial dismissal of an indictment thought by Judge Gourley to have been illegally obtained. We submit that the court below was plainly right in concluding that jurisdic-

tion for this appeal is conferred by 18 U.S.C., Section 3731.

2. Petitioner also contends (Pet. 11-14) that the Court of Appeals should not have based its decision on the rule that judges of coordinate jurisdiction, sitting in the same court and on the same case, should not overrule the decisions of each other, urging (Pet. 11) that this result is in conflict with *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F. 2d 131 (C. A. 2). But, in the first place, this rule is only "a discretionary rule of practice." Cf. *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199. Second, it should be noted that the court below stated at the very outset that the question for decision is "whether there are sufficient reasons" (Pet. 31) for departing from the rule that coordinate judges should not overrule each other in the same case, implying that the rule is not one to be followed blindly in all circumstances. The court's decision that the circumstances of this case did not justify departure from the rule surely presents no question which this Court need review. With respect to conflicts within the Court of Appeals itself, this Court has said, "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901. We submit that the promulgation of standards governing the circumstances under which district court judges within a particular circuit may overrule each other is equally a function which the Court of Appeals for that circuit should perform. Finally, we note that the court below concluded that the result in the *Dictograph Products* case, *supra*, was condi-

tioned by the Second Circuit's "conviction that the second judge had been right in dismissing the complaint whereas the first judge had been wrong in not doing so." (Pet. 36) In this case, as we show below, it is clear that, whether or not Judge Gourley abused his discretion in rehearing the same matter presented to and previously decided by Judge Miller, it is clear that he reached the wrong result and that reversal of his decision was required in either event.

3. On the merits, we submit that it is clear that Judge Gourley's orders dismissing the indictment and suppressing the evidence were erroneous. Even if it be assumed *arguendo* that Judge Gourley was right in holding that the evidence in question had been obtained from petitioner in violation of his privilege against self-incrimination, there would be no basis for dismissing the indictment. *Lawn* v. *United States*, 355 U. S. 339, 349-350; *Holt* v. *United States*, 218 U. S. 245; *Costello* v. *United States*, 350 U. S. 359. But it seems clear that there was no such infringement of petitioner's privilege. The evidence furnished the investigating agent by petitioner is not rendered inadmissible by the fact that the agent did not advise him of the dual purpose of the examination, *i.e.*, that the case might develop into one of criminal prosecution. *Turner* v. *United States*, 222 F. 2d 926, 929-932 (C. A. 4th), certiorari denied, 350 U. S. 831; *Montgomery* v. *United States*, 203 F. 2d 887, 892-893 (C. A. 5th); *United States* v. *Frank*, 245 F. 2d 284, 286 (C. A. 3d); *Vloutis* v. *United States*, 219 F. 2d 782, 787 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 64-65 (C.A. 8th); Cf. *Powers* v. *United*

States, 223 U. S. 303, 313-314; *Wilson* v. *United States*, 162 U. S. 613, 621-624. This is true *a fortiori* here, where the initial suspicions that petitioner might have been involved in criminal conduct with employees of the Internal Revenue Service (as to which, Judge Gourley held, petitioner should have been warned) were not borne out by the investigation which disclosed wholly independent criminal conduct. It follows, therefore, that Judge Gourley erred in granting petitioner's motion to suppress evidence as well as in ordering the indictment dismissed. It should be noted, moreover, that denial of certiorari at this stage would not finally close the door on petitioner's contention. He is free to renew it at the trial (*Smith* v. *United States*, 348 U. S. 147, 150-151; *Cogen* v. *United States*, 278 U.S. 221, 224) and, in the event he is convicted, to urge it upon his appeal from the conviction.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH F. GOETTEN,
RICHARD B. BUHRMAN,
Attorneys.

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